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Address Delivered Before the Barristers Club of San Francisco Entitled "What is Wrong with the Supreme Court of the United States?"

ADDRESS DELIVERED BY JESSE W. CARTER, ASSOCIATE JUSTICE OF THE SUPREME COURT OF CALIFORNIA, BEFORE THE BARRISTERS CLUB IN THE LOUNGE OF THE BAR ASSOCIATION, 2200 MILLS TOWER, SAN FRANCISCO, AT A LUNCHEON ON THURSDAY, NOVEMBER 20TH, 1958, ENTITLED "WHAT IS WRONG WITH THE SUPREME COURT OF THE UNITED STATES?"

Ladies and Gentlemen:

I offer no apology for speaking on the subject "WHAT IS WRONG WITH THE SUPREME COURT OF THE UNITED STATES?" because I wish to expose the fallacy of the numerous articles published in recent months of a disparaging nature.

Every student of history knows that several times during our national history the Supreme Court of the United States has been subjected to attacks by segments of our population. This has occurred at least three times during my lifetime. In recent years, particularly since 1954, many vicious, and, I believe, unfounded attacks have been made upon the Court and its individual members by various individuals and groups for the obvious purpose of placing the Court in

public disfavor and inspiring action by Congress to limit the Court's power in certain fields of judicial activity. These attacks relate not only to the soundness of the decisions of the Court but to the character of the individual justices who have occupied the bench of that great court. Those of us who believe in the right of free discussion welcome constructive criticism of the official conduct of public officials, including the judiciary.

It is an accepted truism that there are two sides to every case and criticism of a court decision may be expected from those on the losing side and their sympathizers. Certainly, no judge worthy of his position, would resent constructive criticism of a decision rendered by him either by the litigants involved therein or the members of the public. Such criticism is a part of the American tradition of free discussion and should be welcomed by our courts.

Vicious, unfounded attacks upon the character and motives of the justices or judges are quite a different matter and should be dealt with by the organized bar. Judges

cannot defend themselves against attacks of this character. Here are a few of such attacks against the Justices of our Highest Court. In a circular issued recently by "American Nationalist," Box 301, Inglewood, California, the following appears: "WANTED FOR IMPEACHMENT. . . . Earl Warren is a fanatic who will stop at nothing to achieve his goals. He should be handled with extreme caution, and all decrees and decisions handed down by him should be regarded as suspect. Persons wishing to aid in bringing him to justice should contact their congressmen to urge his impeachment for treason.

"Warren is considered to be a dangerous and subversive character. He is an apparent sympathiser of the Communist party and has rendered numerous decisions favorable to it. His accomplices include Justice Felix Frankfurter, who is a former defense attorney for Communists, and Justice Hugo Black, whose sister-in-law is a registered Communist.

"Warren is a rabid agitator for compulsory mongrelization and has handed down various decisions compelling

whites to mix with Negroes in the schools, in public housing, in restaurants and in public bathing facilities. He is known to work closely with the NAACP and favors the use of force and coercian [sic] to compel white school children to mingle intimately with Negroes."

In another circular which purports to contain an excerpt from The Congressional Record of February 17th, 1956, it is stated that "The Supreme Court of the United States has joined in the attack of the national revolutionists against the American constitutional system. The Supreme Court has not only scrapped the fundamental principles of the Bill of Rights of the Constitution, but it has usurped the legislative prerogatives of the Congress and the legislatures of the sovereign states. Furthermore, the Supreme Court has ruthlessly violated the ancient common law doctrine of stare decisis, which means that principles established by a previous Supreme Court shall not be set aside by the court." Another circular which purports to have been issued by America's

Future, Inc., 542 Main Street, New Rochelle, New York, is entitled "Nine Men Against America." This circular is devoted to an attack upon the entire Supreme Court because of the desegregation decision of 1954. Another circular entitled "When Is A Supreme Court Decision 'The Law of The Land?'" which purports to have been prepared by Jule W. Felton, Chief Judge, Court of Appeals of Georgia, contains the following statement: "When the Supreme Court itself undertakes to reverse or modify its initial decision ascertaining and defining intent in either class of cases, it is exceeding its power under our constitutional system. The decisions of the Court acting beyond the scope of its power are wholly and completely void and are entitled to no respect and obedience any time or anywhere. The fact that the court may have been endeavoring to attain idealistic and, to its way of thinking, desirable goals cuts no figure, because the end does not justify unconstitutional means. If these are desired under our form of government they must be obtained by legal means."

When the Conference of Chief Justices met at Pasadena in August of this year it adopted a report of the committee of said conference on "Federal-State Relationships as Affected by Judicial Decisions." This report purports to review many recent decisions of the Supreme Court of the United States and is highly critical of the soundness of these decisions and of the judicial process followed by the court. The concluding pages of this report contain the following statement: "We do not believe that either the framers of the original Constitution or the possibly somewhat less gifted draftsmen of the Fourteenth Amendment ever contemplated that the Supreme Court would, or should, have the almost unlimited policy-making powers which it now exercises. It is strange, indeed, to reflect that under a constitution which provides for a system of checks and balances and of distribution of power between national and state governments one branch of one government -- the Supreme Court -- should attain the immense, and in many respects, dominant, power which it now wields.

"It has long been an American boast that we have a government of laws and not of men. We believe that any study of recent decisions of the Supreme Court will raise at least considerable doubt as to the validity of that boast. We find first that in constitutional cases unanimous decisions are comparative rarities and that multiple opinions, concurring or dissenting, are common occurrences. We find next that divisions in result on a 5 to 4 basis are quite frequent. We find further that on some occasions a majority of the Court cannot be mustered in support of any one opinion and that the result of a given case may come from the divergent views of individual Justices who happen to unite on one outcome or the other of the case before the Court."

The report adopted by the Conference of Chief Justices concluded that the over-all tendency of decisions of the Supreme Court of late has been to press the extension of federal power, particularly at the expense of state sovereignty by extensive supervision of state action through the provisions

of the Fourteenth Amendment. This tendency according to the report raises at least considerable doubt as to the validity of the long-time American boast, that we have a government of laws, not of men.

Criticism of the Supreme Court is not new. Among the first to attack its decisions and functions was Thomas Jefferson, a man of stature and whose opinions were entitled to respect. Although his attack was directed primarily at the Supreme Court it went much further and encompassed the whole judicial system. He declared: "It is a very dangerous doctrine to consider the judges as the ultimate arbiters of all constitutional questions. It is one which would place us under the despotism of an oligarchy." This charge has a familiar ring. It has been resurrected today and again placed in the arsenal to be used as ammunition by those critical of the present court decisions. In discussing the Dred Scott decision Lincoln said, "We know the court that made it has often overruled its own decisions and we should do what we can to

have it overrule this one." However, he significantly added: "We offer no resistance to it." This thought apparently is forgotten by some today. When the Court ruled much of the early New Deal social and economic legislation unconstitutional, the clamor of criticism rose to a fever pitch, urging changes in the Court's traditional functions, and even its abolition.

These criticisms came at a time of great industrial unrest when it was believed by some of our national leaders that the reactionary tendency of the Court was blocking our economic recovery. Criticism under such circumstances might be justified. As Mr. Justice Brewer once remarked: "It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism."

But while criticism is welcome, the question remains whether the resolution of censure adopted by the Conference of Chief Justices is justified. I for one feel that it is not.

Pennsylvania v. Nelson is cited in the report as an example of "the wide sweep now given to the doctrine of

pre-emption," as is Slochower v. Board of Higher Education, Schware v. Board of Bar Examiners of New Mexico, Konigsberg v. State Bar of California, Watkins v. United States and Sweezy v. New Hampshire.

In each of these latter cases, the petitioner before the Court was claiming protection of his rights against hostile state action, which he argued was contrary to the Fourteenth Amendment. These contentions were upheld and the state action ruled violative of the Constitution. These decisions can scarcely be cited as an extension of federal power or contraction of state's rights. The court was merely exercising long ordained federal power of judicial interpretation of a new set of circumstances.

If agitation in Congress and the press is any criteria, the fountainhead of discontent over the Supreme Court's decisions is the case of Pennsylvania v. Nelson. It seems this opinion, probably more than any other, is singled for illustrating the "wide sweep of the doctrine of

pre-emption" and expanding federal power to the extent of endangering our federal system. I think it can be adequately demonstrated that such an interpretation is erroneous

In this case, Nelson, an acknowledged member of the Communist party, was convicted of a violation of the Pennsylvania Sedition Act and sentenced accordingly. The Supreme Court of Pennsylvania reversed. I repeat, reversed, the conviction on the narrow issue that the Smith Act, which prohibits the knowing advocacy of the overthrow of the government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act, which proscribes the same conduct. In its opinion the Pennsylvania Supreme Court stated: "And, while the Pennsylvania statute proscribes sedition against either Government of the United States or the Government of Pennsylvania, it is only alleged sedition against the United States with which the instant case is concerned. Out of this voluminous testimony, we have not found, nor has any one

pointed to a single word indicating a seditious act or even utterance directed against the Government of Pennsylvania."

The United States Supreme Court sustained the state court, reasoning that the federal statutes touch a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject. This conclusion seems eminently sound. The right and duty to protect itself most efficiently effectively against all enemies foreign and domestic has been an inherent power resting in our federal government ever since the adoption of the Constitution in 1787.

It is also interesting to note that in affirming the lower court the United States Supreme Court did not ascribe to the federal government any greater power to latter than what Pennsylvania's highest court had considered properly belonging to it.

Responsible newspapers understood and approved the decision. A Washington correspondent wrote, "In the Steve

Nelson case, the Court ruled the protection of the nation against sedition is a federal, not a State responsibility, and that therefore, the State anti sedition laws are unconstitutional. This decision does not mean that the States can't help the Federal Government guard against subversion It does mean that the responsibility for investigation belongs to the Federal Bureau of Investigation and the responsibility for prosecution belongs to the Department of Justice."

Editorials in the Pittsburgh Post-Gazette, and New York Times endorse the decision. It is pointed out that common sense as well as law argues for the result. The control of sedition is a tricky business; it calls for timing, tact and central direction. The intrusion of state governments in this field could impede the work of federal agents, confuse the issues and even discredit laws against sedition.

Thus, it seems clear that the cases relied on in the report to the State Chief Justices are not authority for

the proposition cited. Instead they are authority to the contrary. The problems with which the Court has to deal involve the basic structure and development of our democratic system. In resolving these problems, the Court has of necessity been faced with the same fundamental question posed by Abraham Lincoln on the eve of the Civil War as to whether "a government must of necessity be too strong for the liberties of its own people or too weak to maintain its own existence." In examining the recent Supreme Court's opinions we are reassured that they are doing their best to answer this question by preserving the institutions, structure and freedoms as we know them.

While I may not agree with the majority of the Supreme Court in all of the cases criticized by the Conference of Chief Justices in said report, I want to state very positively that I entirely disagree with every word of criticism which has been heaped upon the Supreme Court of the

United States since Earl Warren became Chief Justice of Court, and as a judge, a lawyer and citizen I resent and condemn the vicious attacks which have been made upon Chief Justice Warren and his associates in the various publications from which I have just quoted and any other similar attacks regardless of their origin or sponsorship. These attacks have no foundation in fact, are basically false and clearly unjustified from any standpoint. Anyone who knows Earl Warren and is familiar with his public career, whether they like him or not, cannot question his honesty and integrity or his loyalty to this state and nation. In my opinion, his career as Chief Justice of the Supreme Court of the United States has been outstanding both in the administration of the business of the Court and his fearless and forthright approach to problems which have been presented to that Court during the last five years. While he may have erred in his view of law in certain instances, such errors, if any there were, were the result of an honest error of judgment which may befall any

judge or other human being no matter how wise he may be. In my opinion the same may truly be said of all of the associate justices of the Supreme Court of the United States. They all men of unimpeachable honesty, excellent character and unquestioned loyalty. They are men well trained in the law, and the decisions they have written and the positions they have taken have been the result of their honest approach to the problems as they saw them.

It is indeed unfortunate that we have in our society some people of standing in their community and professional life who seek to destroy by the utterance of vicious falsehoods and slanderous innuendo the character of men in high places These people have been appropriately labelled "character assassins." They are the type of people who have authored circulars and publications from which I have read to you today. You may rest assured that even if one iota of these baseless charges were true, there are those in the Congress of the United States who would make such charges the basis of

impeachment proceedings against any member of the Supreme Court guilty thereof and any factual basis for such a charge would be explored to the fullest extent.

The criticism of certain decisions of the Supreme Court of the United States by the report adopted by the Conference of Chief Justices is of little value. Running through this report is an obvious resentment against the Supreme Court for its decisions in the desegregation cases This resentment, of course, is the result of a deep-seated racial prejudice existing in the minds of many very fine people in this country which will take years to erase. It may be that the desegregation cases were ill-timed, but as a student of constitutional law I am unable to see how a different result could be reached under any reasonable interpretation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Of course the chief critics of the present Supreme Court of the United States do not like the Fourteenth

Amendment. One of them, Hugh G. Grant, has this to say about this amendment: "The 14th amendment was ratified and placed in the Constitution at the point of Federal bayonets.

"The 14th amendment was a fraud and a violation of the Constitution. And yet it was the only legal basis cited by Mr. Chief Justice Warren in his announcement of the infamous decision of May 17, 1954, outlawing segregation in the public schools of the sovereign States. What a travesty on justice!" It is likewise obvious that the Chief Justices who concurred in the report which was adopted at their conference last August also have misgivings about the Fourteenth Amendment.

It will be remembered that this amendment was adopted in 1868. For the first fifty or sixty years after its adoption, it was applied by the Supreme Court to protect only property rights and corporations and we heard no criticism from those in high places about its invalidity. It now seems that when the court attempts to apply this amendment for the

purpose of protecting human rights which are being ruthlessly violated by states, it has become a target for those who are more concerned about state's rights than the rights of American citizens to enjoy life, liberty and the pursuit of happiness guaranteed by the Fourteenth Amendment to all regardless of race, color, creed or material wealth.

In its long history, controversy is not new to the Supreme Court of the United States nor its Chief Justices. Congress, in fact, once passed a law to prevent the Supreme Court from hearing an appeal and the court assented. The case involved the conviction of a Mississippi editor by a military tribunal during the reconstruction period.

Controversy actually began in 1801 when Chief Justice John Marshall first proclaimed the power of the Supreme Court to declare acts of Congress and state laws unconstitutional. That displeased Presidents Thomas Jefferson and Andrew Jackson. Controversy erupted violently when the court, under Chief Justice Roger Taney, upheld the fugitive

slave law and later rendered the Dred Scott decision. It arose again at the turn of the twentieth century when the Court nullified a number of state and federal laws dealing with taxes and business regulation. It was during this period that President Theodore Roosevelt proposed a recall of judicial decisions.

An open conflict between the president and the Court flared in 1937 when President Franklin D. Roosevelt proposed a law to enlarge the Court. Decisions then were being attacked for striking down a series of New Deal laws.

Today the principal opponents of the Court are found in Congress and throughout the southern states where objections are being raised that the Court is trespassing on the powers of Congress and the states, and tending to make law instead of interpreting it.

The close of the 1958 session brought two landmark decisions affecting California. One of these decisions held a California statute unconstitutional which required a church

or a veteran to subscribe to a loyalty oath in order to obtain a tax exemption, and the other upheld the validity of the 160-acre provision in reclamation projects. In both of these cases the Supreme Court of the United States reversed the Supreme Court of California, and I think rightly so as I one of the dissenters when these cases were decided by the Supreme Court of California.

In conclusion, I cannot refrain from stating with of the force and conviction at my command, that in my opinion, there is no justification whatsoever for the attacks which have been made upon the Supreme Court of the United States during the past five years. It is an able and outstanding court, composed of men of unimpeachable character and exceptional ability. It has heard and decided some of the most difficult and intricate legal problems ever presented to any court. In my opinion the problem of desegregation in our public schools, as it relates to the southern states, is our most difficult domestic problem. The Court has been

unanimous in every decision relating to this problem. In my opinion the Court has decided these cases in the only way they could be decided under any honest and reasonable interpretation of the Fourteenth Amendment. The cases involving so-called subversive activities were decided with regard to the Bill of Rights which must be applied in every case involving civil liberties or in none at all.

When we eliminate the criticism of those who are prejudiced against the Court because of its desegregation decisions and those who would deny to persons charged with subversive activities the civil liberties guaranteed by the Bill of Rights, the criticism of the present Court fades into insignificance. It is my considered opinion that the great who now occupy seats on the Supreme Court of the United States are entitled to the respect and admiration of all honest, fair-minded people. These men believe in applying principles of the Bill of Rights to every criminal case regardless of the race, color, creed or nature of the charge

against the accused, and the safeguards of the Fourteenth Amendment to prevent a state from invading those rights. With such men on our Supreme Court, we are able to point with pride to the words cut in the solid granite over the entrance to the Supreme Court Building in Washington -- "Equal justice under law" -- which are now being translated into a living reality.